Filed 6/29/10 Fessenden v. Onthank CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ROBERT M. FESSENDEN et al., Plaintiffs and Appellants, v. CURTIS ONTHANK et al., Defendants and Appellants.	H033617 (Monterey County Super. Ct. No. M79610)

The present case involves a dispute over a strip of land between adjacent residential properties. Plaintiffs Robert M. Fessenden and Julie A. Fessenden, trustees of the Fessenden Family Trust, brought an action to quiet title and for injunctive relief to have defendants Curtis H. Onthank and Susan E. Ashelford remove all structures and other improvements from the disputed area.[1] Defendants then filed a cross-complaint for adverse possession, agreed boundary, prescriptive easement, and injunctive and declaratory relief. The trial court granted summary adjudication to plaintiffs on defendants' adverse possession claim. After trial, the court quieted title to the disputed area in favor of plaintiffs and granted defendants an equitable easement over a portion of the disputed area. On appeal, defendants contend that the trial court erred in granting summary adjudication for plaintiffs as to defendants' adverse possession claim; and (2)

[1] Defendants Bank of America, N.A. and National City Bank are not parties to this appeal.

the trial court abused its discretion in awarding defendants an equitable easement as to only a portion of the disputed area. In their cross-appeal, plaintiffs contend that the trial court erred as a matter of law in awarding defendants an equitable easement. We find no error and affirm the judgment.

I. Statement of the Case

In August 2007, plaintiffs filed a motion for summary judgment on the complaint, or alternatively, summary adjudication as to each of defendants' affirmative defenses, and for summary judgment on the cross-complaint. About a month later, defendants filed a motion for summary judgment on the complaint and for summary adjudication on the cross-complaint and on plaintiffs' affirmative defenses to the cross-complaint. The trial court found, among other things, that defendants failed to establish that they had paid taxes on the disputed area and thus did not satisfy the requirements of their adverse possession claim. Accordingly, the trial court granted plaintiffs' motion for summary adjudication as to the adverse possession claim. The trial court also found that defendants had not acquired any ownership interest or use rights under the agreed boundary doctrine or a prescriptive easement. The trial court denied plaintiffs' request for injunctive relief to remove defendants' improvements. The trial court also denied defendants' motion for summary judgment, and granted its motion for summary adjudication as to plaintiffs' affirmative defenses of estoppel, laches, and unclean hands. Following trial, the trial court quieted title in favor of plaintiffs and granted defendants a limited equitable easement for the exclusive use of a portion of the disputed area.

II. Motion for Summary Adjudication

A. Statement of Facts[2]

Plaintiffs are the owners of real property at 979 Coral Drive (lot 8) in Pebble Beach, which they acquired in 2001. Defendants are owners of the adjacent property at 2959 Peisano Road (lot 7) in Pebble Beach. They purchased their residence in 1988. The legal description of the parties' properties is set forth in their respective deeds.

In 2005, plaintiffs commissioned a survey of their property and discovered that a strip of land, which is approximately 1,233 square feet, is part of the legal description of lot 8. The disputed area is somewhat rectangular in shape. It is approximately 16 feet wide on Peisano Road and narrows to 8.4 feet at the rear boundary. Its length is approximately 108 feet along the recorded line between the parties' lots. The disputed area is divided into two segments. The northern portion, which is approximately 577 square feet, extends back from Peisano Road to a stucco wall and gate that are located at the right front corner of defendants' residence. The stucco wall is consistent with the architecture and materials used in defendants' residence. The northern portion is not enclosed by fences, and there is a cypress tree and some boulders in this portion. The southern portion is enclosed on three sides by the stucco wall and wooden fences. The fence separating the two properties has been in place since 1988. The southern portion, which is approximately 656 square feet, contains paving, landscaping, and a hot tub. Defendants' residence is about five feet from the recorded boundary line.

Residential property in Pebble Beach is assessed by lot number and location, using the legal description of the property as set forth in the deed. Thus, plaintiffs' property was assessed for purposes of taxes based upon its assessor's parcel number (APN 007-252-011-000) and square footage as stated in the Monterey County Assessor's Map.

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[2] The statement of facts is based on undisputed facts and evidence presented by defendants in opposition to the motion for summary judgment, or alternatively, summary adjudication.

Plaintiffs have paid the taxes on lot 8. When defendants purchased lot 7, the disputed area was presented to them as part of the property that they were purchasing. Thus, they believed that the disputed area was included in the purchase price of $525,000.

Defendants also submitted the declaration of W. Jack Kidder, a real estate appraiser. Kidder outlined the procedure used by the Monterey County Assessor's Office for property transferred after the passage of Proposition 13: (1) the county recorder's office sends a copy of the deed transferring ownership of the property to the assessor; (2) a clerk in the assessor's office reviews the deed and determines if the seller and the legal description of the property on the deed match the assessee and the legal description on the assessment roll; (3) the clerk enters the name of the new property owner for the future assessment roll; (4) a copy of the deed is forwarded to an appraiser in the assessor's office; and (5) the appraiser notes the purchase price of the property, and "based on his or her knowledge of property values generally for the type being sold, 'appraises' the property by enrolling a new value on the assessment roll for the ensuring year that will then become the 'base year value' upon which subsequent annual increases under Prop 13 will be computed." The assessor's office does not have a policy or practice of physically inspecting the property. However, inspections may occur when a property owner challenges an assessment or there is "a change in property title at other than arms-length conditions." In Kidder's opinion, the disputed area was included in the purchase price of lot 7, and since tax assessment after Proposition 13 is based on the purchase price of the property, defendants have been paying taxes on the disputed area since 1988.

B. Standard of Review

"'"Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo.' [Citation.] The party moving for summary judgment bears the 'burden of persuasion' that there are no triable issues of material fact and that the moving party is entitled to judgment as a matter of law. [Citation.] 'There is a triable issue of

material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Food Pro Intern., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 993-994.)

C. Discussion

"To establish title by adverse possession, the claimant must establish the following five requirements: 1) Possession under claim of right or color of title; 2) actual, open, and notorious occupation of the premises in such a manner as to constitute reasonable notice to the true owner; 3) possession which is adverse and hostile to the true owner; 4) possession which is uninterrupted and continuous for at least five years; and 5) payment of all taxes assessed against the property during the five-year period. [Citations.]" (*Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604; Code Civ. Proc., § 325.) The parties agree that defendants have satisfied the first four requirements for adverse possession. At issue is whether defendants have paid taxes on the disputed area.

Defendants first claim that the issue of who paid taxes was a triable question of fact.[3]

Generally, the issue of whether a claimant has paid taxes to satisfy the requirements for adverse possession is a question of fact. (*Williams v. Stillwell* (1933) 217 Cal. 487, 493; *Finley v. Yuba County Water Dist.* (1979) 99 Cal.App.3d 691, 698.) However, here, the relevant and material facts about the legal descriptions of the lots, plaintiffs' payment of taxes for lot 8, and the purchase price of lot 7 in 1988 are undisputed by the parties. The issue before the trial court, and this court, is a legal

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[3] Defendants took a contrary position in their opposition to plaintiffs' motion for summary judgment, or alternatively, summary adjudication. At that time, defendants argued that the trial court could rule as a matter of law that they acquired title to the disputed area through adverse possession.

question, that is, whether defendants could show that they had paid taxes on the disputed area based on the purchase price of lot 7. (See *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 ["If . . . the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominately legal . . . ."].)

"Ordinarily, when adjoining lots are assessed by lot number, the claimant to the disputed portion cannot establish adverse possession because he cannot establish payment of taxes. [Citations.]" (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 326 (*Gilardi*); see also *Mann v. Mann* (1907) 152 Cal. 23, 29.) There are two exceptions to this rule. First, a claimant may show that there was an error in the description on the assessment roll, and that the claimant paid taxes on the disputed portion. (*Gilardi*, at p. 327.) Second, "where the claimant by construction of buildings or other valuable improvements or by the building of fences has visibly shown occupation of a disputed strip of land adjoining the boundary, several cases have reasoned that the 'natural inference' is that the assessor did not base the assessment on the record boundary but valued the land and improvements visibly possessed by the parties. [Citations.]" (*Gilardi*, at p. 327.) However, this inference can be dispelled where there is no evidence that the property was visibly assessed. (*Gilardi*, at p. 327.)

Here, the lots were assessed by lot numbers and plaintiffs established that they paid taxes on lot 8, which included the disputed area. There was no evidence that there was any error in the assessment rolls or the legal descriptions of lots 7 and 8. There was also no evidence that the assessor visibly assessed either lot. Thus, defendants failed to establish that the present case fell within the exceptions to the *Gilardi* rule.

Defendants argue, however, that *Gilardi* is not controlling because it relied on cases decided before Proposition 13 went into effect. They contend that taxes are no longer assessed on lot numbers, but are assessed based on the fair market value of the property. According to defendants, the disputed area was included in the purchase price

of lot 7, and since taxes were assessed based on this price, they have paid taxes on the disputed area since 1988.

In June 1968, California voters adopted Proposition 13. (Cal. Const., art. XIII A, §§ 1-6.) "Unless otherwise provided, in California all real estate is assessed at fair market value for the purposes of taxation. (Cal. Const., art. XIII, § 1 et seq.) One of the most crucial exceptions is carved out by Article XIII A which sets a constitutional limit on the maximum amount of tax that may be levied on real property. That limit on all residential and commercial property is 1 percent of the 1975 base year value which may be enhanced to reflect an inflation rate of no more than 2 percent per year. (Art. XIII A, § 2, subd. (b).) An exception to this rule is supplied in section 2, subdivision (a), which allows the limit to be raised in case a change in ownership has occurred subsequent to the 1975 assessment. In the latter instance, the real property is reappraised at fair market value as of the date of change and the rate of 1 percent is calculated according to the newly established value of the property. (Art. XIII A, § 1, subd. (a), § 2, subd. (a).)" (*R. H. Macy & Co. v. Contra Costa County* (1990) 226 Cal.App.3d 352, 356.) Thus, Proposition 13 created a "balance between the goals of tax limits (the 1 percent cap), tax certainty (limits on increases in assessed valuation), and stable revenue to local governments (reassessment upon change of ownership)." (*Northwest Financial, Inc. v. State Bd. of Equalization* (1991) 229 Cal.App.3d 198, 206, fn. 6.)

Defendants have not persuaded us that *Gilardi* is no longer good law. Though Proposition 13 established that a tax assessment may be based on the fair market value of real property at the time of purchase, defendants have failed to show that the voters intended to create a change in adverse possession law. Moreover, where the legal description of a lot does not include the disputed area and a claimant asserts that he or she has paid taxes on the disputed area, the determination as to the dimensions of the lot is more appropriately made by an independent entity, such as the assessor. No such

determination can be reached unless the assessor has visibly inspected the property.[4] Otherwise, a claimant could establish the payment of taxes element of an adverse possession claim by merely asserting his or her subjective belief that the disputed area was acquired at the time of purchase. We decline to adopt such a rule.[5]

Defendants also argue that inconsistent rulings on the payment of taxes issue constitutes reversible error. We disagree.

In ruling on the motion for summary adjudication, Judge Dauphine ruled that defendants had not paid taxes on the disputed area as a matter of law. Judge O'Farrell was the trial judge. At trial, defendants introduced evidence on the issue of the payment of taxes. After plaintiffs objected on the ground that the issue had already been decided adversely to defendants, defendants stated that they were not introducing the evidence for the purpose of proving adverse possession but rather to establish that they had suffered hardship. Judge O'Farrell ruled that "[i]t may not be terribly relevant or key, but I can't say it's irrelevant." Judge O'Farrell's statement of decision refers to the issue: "[T]he undisputed evidence is that defendants have been regularly paying property taxes attributable to the disputed area." When plaintiffs pointed out that the payment of taxes was not an issue at trial and consequently they had not introduced evidence relating to the issue, Judge O'Farrell explained that "it had some relevance on the issue of the innocence, the lack of bad faith and those kinds of things, which would not be contrary to any ruling by the other judge in the summary judgment; it's limited to those purposes." After defendants argued that there had been inconsistent rulings, Judge O'Farrell stated:

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[4] We disagree with defendants' position that no claimant can establish adverse possession post-Proposition 13 because the assessor no longer makes visual inspections of real property. Such inspections may occur when a property owner challenges an assessment or a property owner makes significant improvements.

[5] Defendants' reliance on *Sorensen v. Costa* (1948) 32 Cal.2d 453 (*Sorensen*), is misplaced. In *Sorensen*, there was an error in the description of the parties' and their adjoining neighbors' lots on the assessment rolls. (*Sorensen*, at pp. 465-467.) No such error exists in the present case.

"Well, I'm not going to change her decision. What can I say? Her decision stands on its own and that's where it is." Thus, Judge O'Farrell acknowledged that the reference to the payment of taxes was limited to defendants' state of mind and their good faith in making improvements in the disputed area. Accordingly, the rulings are not inconsistent.[6]

III. Trial on Injunction and Equitable Easement

A. Statement of Facts

Robert Fessenden, a licensed architect, testified that he and his wife acquired lot 8 when her mother died in 2000. The Hagstrom's, who were his wife's parents, purchased lot 8 in the early 1970's. In 2005, plaintiffs commissioned a survey of their lot to determine the parameters of a remodel of the residence, which would include "a very handsome outdoor living space." They discovered that a portion of their lot was enclosed by defendants' fences, which had been present since the Hagstrom's purchased the lot. In Fessenden's opinion, the "obvious location" for their patio would be where the present driveway is, which would necessitate moving the present driveway to the disputed area. The new driveway would "create a space where [they could] back out of the garage and head out to the street without having to back the entire way out to the street." There would also be a landscape buffer between the driveway and the proposed new fence.

Curtis Onthank, one of the owners of lot 7, described the improvements in the disputed area. These improvements included: a stucco wall with 18-inch square concrete pillars; a 66-foot wooden fence with four-by-four posts every eight to 10 feet that are embedded in concrete 18 to 24 inches deep; a portable above-ground hot tub with steps on two sides which are anchored in cement; hardscape consisting of Carmel stone, which

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[6] Since we conclude that defendants' adverse possession claim fails, we need not reach defendants' contention that this claim applied to the entire disputed area, not just the southern portion.

is four to four and one-half inches deep; and underground electrical wiring to the hot tub, the outdoor lighting, and outdoor speakers. According to Onthank, the wooden fence had been in its present location since 1974. He believed the concrete wall was constructed in the '30s when a den was added to the residence. Onthank testified that the loss of the disputed area would affect him both emotionally and financially, and he would not have purchased lot 7 if there had been a wall within five feet of the house.

Susan Ashelford testified that she and her husband purchased the property in 1988 for $525,000. At that time, she believed that the disputed area was part of lot 7 because the stucco wall extends from the front of their residence and the only way to access the enclosed area is through their residence. If she had known that the boundary line was not where the fence is, she would not have purchased the property. She explained that there are 25 feet of windows on the side of the residence facing the disputed area and it would have been "very claustrophobic" to have a fence of trees so close to the residence. She also described the extensive landscaping in the enclosed area.

Prior to the initiation of the present dispute in 2005, none of the occupants of lot 8 ever indicated that they believed the disputed area belonged to them. In October 1974, Leonard Hagstrom submitted plans to the Pebble Beach Company for a storage shed addition on lot 8. These plans indicated that the boundary line between lots 7 and 8 was located where the present wood fence is.

Kidder testified that the value of the disputed area was $110,000. Kidder also opined that if plaintiffs were to gain an equitable interest in the disputed area, then the fair market value of the disputed area would be $5,500 per year.

B. Statement of Decision and Judgment

Following trial, the court issued a statement of decision. Relying on *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749 (*Hirshfield*), the trial court applied the relative hardship doctrine, denied plaintiffs' request for an injunction, and granted defendants an

equitable easement over a portion of the disputed area. The equitable easement allows defendants to keep most of the improvements. It also allows plaintiffs to relocate their driveway to the disputed area. The trial court ordered that defendants pay plaintiffs $700 per year in exchange for the equitable easement, which would terminate when neither defendant resides on lot 7 or lot 7 is sold.

C. Discussion

Both parties challenge the trial court's ruling. Plaintiffs argue that the trial court erred as a matter of law in granting defendants an equitable easement to any of the disputed area. Defendants contend that the trial court abused its discretion in determining that the equitable easement applied only to a portion of the disputed area.

Hirshfield outlined the relative hardship doctrine,[7] which courts apply in considering whether to grant an injunction prohibiting a trespass on another's real property. (*Hirshfield*, *supra*, 91 Cal.App.4th at p. 758.) In *Hirshfield*, the parties were adjoining owners of residential property, and the plaintiffs sought an injunction ordering the removal of certain improvements, including a chain link fence, waterfalls, a koi pond and stone deck, a putting green, a sand trap, and a concrete block wall, which the defendants had constructed on the plaintiffs' property. (*Hirshfield*, at pp. 755-756.) The plaintiffs wanted access to this portion of their property in order to build a driveway and a greenhouse. (*Hirshfield*, at pp. 756-757.) The trial court denied the injunction and awarded defendants an equitable easement to the area in dispute. (*Hirshfield*, at p. 758.)

In rejecting the plaintiffs' claim that the trial court misapplied the relative hardship doctrine, *Hirshfield* outlined the appropriate test: "To deny an injunction, three factors must be present. First, the defendant must be innocent. That is, his or her encroachment

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[7] This equitable doctrine is also referred to as the doctrine of balancing of equities, balancing conveniences, and comparative injury. (*Hirshfield*, *supra*, 91 Cal.App.4th at p. 754, fn. 1.)

must not be willful or negligent. The court should consider the parties' conduct to determine who is responsible for the dispute. Second, unless the rights of the public would be harmed, the court should grant the injunction if the plaintiff 'will suffer irreparable injury . . . regardless of the injury to defendant.' Third, the hardship to the defendant from granting the injunction 'must be *greatly disproportionate* to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant. . . .'" (*Hirshfield*, 91 Cal.App.4th at p. 759, quoting *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 562-563 (*Christensen*).) *Hirshfield* also observed that "[o]verarching the analysis is the principle that since the defendant is the trespasser, he or she is the wrongdoer; therefore, 'doubtful cases should be decided in favor of the plaintiff.'" (*Hirshfield*, at p. 759, quoting *Christensen*, at p. 562.)

After upholding the denial of injunctive relief, *Hirshfield* considered the plaintiffs' challenge to the trial court's award of an equitable easement to the defendants. (*Hirshfield*, *supra*, 91 Cal.App.4th at p. 764.) As *Hirshfield* explained, the refusal to order the removal of improvements on another's land constitutes "'a judicially created easement by a sort of non-statutory eminent domain.' [Citations.] However, the courts are not limited to judicial passivity as in merely refusing to enjoin an encroachment. Instead, in a proper case, the courts may exercise their equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use." (*Hirshfield*, at pp. 764-765, quoting 3 Powell on Real Property (1994) Easements and Licenses, § 34.09, p. 34-101, fn. omitted.) This determination is reviewed under the abuse of discretion standard. (*Hirshfield*, at p. 771.) "Under that standard, we resolve all evidentiary conflicts in favor of the judgment and determine whether the court's decision '"falls within the permissible range of options set by the legal criteria."' [Citations.]" (*Hirshfield*, at p. 771.)

Relying on *Dolske v. Gormley* (1962) 58 Cal.2d 513 (*Dolske*), plaintiffs argue that defendants did not satisfy the first factor for application of the relative hardship doctrine, that is, that their predecessors in interest were innocent.

In *Dolske*, the plaintiff's predecessors in title constructed a house that encroached on the defendant's adjoining lot. (*Dolske*, *supra*, 58 Cal.2d at p. 516.) Several years later, litigation ensued in which the defendant filed a cross-complaint, seeking an injunction that ordered the removal of the encroachments. (*Dolske*, at p. 518.) The California Supreme Court held that the trial court had abused its discretion in ordering the plaintiff to remove the encroachments and reversed the judgment. (*Dolske*, at p. 520.) Relying on the relative hardship doctrine as set forth in *Christensen*, *supra*, 114 Cal.App.2d 554, the Supreme Court stated that a trial court must consider, among other factors, "the good faith of the party who constructed the encroachments (*Blackfield* v. *Thomas Allec Corp.* [1932] 128 Cal.App. 348, 349 [(*Blackfield*)].)" (*Dolske*, at pp. 520-521.) Reviewing the record before it, *Dolske* stated that "it [did] not appear that the encroachments were constructed negligently or in willful disregard of the property rights of [the defendant] or her predecessors in title," and also noted the defendant's significant delay in seeking injunctive relief. (*Dolske*, at p. 521.)

We first note that *Christensen* focused on the defendant's innocence, stating that "the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation." (*Christensen, supra,* 114 Cal.App.2d at p. 563.)[8] *Blackfield*, on the other hand, noted that the trial court had found that the encroachment was erected by the defendant's immediate predecessor in interest and was the result of excusable mistake. (*Blackfield*, *supra,* 128 Cal.App. 348 at p. 349.) Though *Blackfield* referred to this fact in balancing the equities,

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[8] *Hirshfield* also focuses on the defendant's, rather than his or her predecessor's in interest, state of mind. (*Hirshfield*, *supra*, 91 Cal.App.4th at p. 759.)

it did not assert as a general principle that the state of mind of the party who constructed the encroachment was a determinative factor in deciding whether to grant injunctive relief. However, even assuming that defendants in the present case were required to focus on their predecessors' in interest state of mind, we find no error.

Here, the trial court found that defendants' innocence was undisputed, noting that "when defendants bought the property in 1988, the disputed area clearly appeared to be a part of the property they were purchasing, and nothing since then would have given them reason to think otherwise." Turning to the evidence relating to defendants' predecessors in interest, the record establishes that the wooden fence has been in its present location since 1974 and the previous owner of lot 8 submitted a plan the following year in which he identified the wooden fence as the boundary line between the two lots. His acceptance of the placement of the fence suggests that the prior owners of lot 7 constructed it in good faith. Moreover, as the trial court noted, "[h]ad the original builder of defendants' home been aware of the discrepancy, the house would have certainly been situated differently on the lot so as not to virtually abut against the neighboring property." Thus, there was sufficient evidence that defendant's predecessors in interest were also innocent in constructing the improvements in the disputed area.

Plaintiffs next challenge the trial court's application of the third factor of the relative hardship doctrine.

In its statement of decision, the trial court acknowledged plaintiffs' desire to relocate their existing driveway to the disputed area so that they could construct a patio where the driveway currently exists. The trial court then stated that if judgment were entered in favor of plaintiffs, defendants would be required "to move a fence, hot tub, extensive landscaping, at least a portion of a stone walkway, and underground plumbing and electrical" and the cost of this removal would be "substantial." The trial court further found that "[i]n addition to the expense and disruption to defendants' property, the most significant detriment to the defendants would be the loss of sunlight, fresh air and privacy

from having a fence and/or tall plants forming a barrier just a few feet from the windows in the primary living areas of their home, and the concomitant disfigurement of a house situated virtually on its neighbor[']s property line. [¶] When defendants bought their home they paid full price for a property that visually was understood by all involved to include the disputed area."

Plaintiffs contend that the improvements and hardships asserted by defendants are not the proper subject for an equitable easement as a matter of law. They rely on *Dolske, supra,* 58 Cal.2d 513, *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228 (*Field-Escandon*), *Ukhtomski v. Tioga Mutual Water Co.* (1936) 12 Cal.App.2d 726 (*Ukhtomski*), and *Blackfield, supra,* 128 Cal.App. 348.

In *Dolske, supra*, 58 Cal.2d 513, the encroachments consisted of a support pillar for a front porch, roof eaves, and a gas meter and pipe. After applying the relative hardship doctrine, *Dolske* reversed the judgment ordering the removal of the pillar, which encroached nine inches, and the eaves, which encroached 19 inches. (*Dolske*, at pp. 520-521.)

In *Field-Escandon*, the defendants' sewer line, which was 65 feet long and eight feet deep, crossed the plaintiff's property from about two to five feet south of the boundary. (*Field-Escandon, supra,* 204 Cal.App.3d at p. 231.) The reviewing court held that the trial court properly enjoined the plaintiff from removing the sewer line, since the plaintiff could build a retaining wall around the sewer, and the defendants would not be able to use their plumbing if the sewer were removed. (*Field-Escandon*, at p. 232.)

In *Ukhtomski*, the defendant constructed a $7,000 concrete reservoir and pipe lines, which was the sole water supply for 500 residents. (*Ukhtomski, supra*, 12 Cal.App.2d at p. 727.) A portion of these improvements encroached on fifteen-hundredths of an acre on the plaintiffs' three-acre parcel. (*Ukhtomski*, at p. 727.) The trial court denied the plaintiffs' request for an injunction, granted the defendants an

easement, and awarded damages to the plaintiffs. (*Ukhtomski*, at p. 728.) Applying the relative hardship doctrine, *Ukhtomski* found no error. (*Ukhtomski*, at p. 729.)

In *Blackfield, supra*, 128 Cal.App. 348, the north wall of the defendant's two-story building was 122 feet 6 inches long, eight inches thick, and 40 feet high. (*Blackfield*, at pp. 348-349.) A portion of the wall encroached on the plaintiffs' property by three and five-eighths inches, the cost to remove the wall was $6,875, and the encroachment did not interfere with the plaintiffs' use of their property. (*Blackfield*, at p. 349.) The reviewing court held that the trial court did not abuse its discretion in denying the plaintiffs' request for an injunction. (*Blackfield*, at p. 350.)

Contrary to plaintiffs' assertion, none of these cases stand for the proposition that an equitable easement is appropriate only where there is "the potential of the very costly destruction of valuable structures based on an insignificant encroachment." Rather, in each of these cases, the court balanced the equities involved to determine whether an equitable easement was appropriate. As *Hirshfield* explained, "[t]he object of equity is to do right and justice. It 'does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. "It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication." [Citation.]' (*Times Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 331.)" (*Hirshfield, supra*, 91 Cal.App.4th at p. 770.)

We also disagree with plaintiffs' characterization of defendants' hardship as "purely emotional and aesthetic." Defendants purchased their house over twenty years ago with the understanding that the purchase price included the disputed area. Their house has 25 feet of windows. If an equitable easement is not granted, the view from these windows will be either a fence or landscaping that can be placed within five feet of

the house. Defendants will also be required, at substantial cost,[9] to remove concrete pillars that are 18-inch square, a 66-foot fence with four-by-four posts every eight to 10 feet that are embedded in concrete 18 to 24 inches deep, a portable above-ground hot tub with steps on two sides which are anchored in cement, hardscape consisting of Carmel stone, which is four to four and one-half inches deep, extensive landscaping, as well as underground electrical wiring to the hot tub, outdoor lighting, and outdoor speakers. The hardship to plaintiffs, however, will be significantly less if the improvements are to remain. Plaintiffs will be able to build their patio in the most desirable location by relocating their driveway to the disputed area, but they will not be able to "back out of the garage and head out to the street without having to back the entire way out to the street." Since the hardship to defendants is "*greatly disproportionate* to the hardship" caused plaintiffs by the continuance of a portion of the encroachments, the trial court did not abuse its discretion.

Plaintiffs also claim that the easement granted to defendants is 680 square feet, which "far exceeds the size of easements upheld in the reported cases." We find no merit to plaintiffs' claim. First, the judgment and the attached exhibit establish that the equitable easement granted to defendants is significantly less than 680 square feet. Though not stated in square footage, the easement appears to be approximately half of the southern portion of the disputed area. Second, the size of the easement is not dispositive. In *Ukhtomski*, the reviewing court agreed with the plaintiffs that the amount of land taken in prior cases was significantly less than was involved in the case before it. (*Ukhtomski*, *supra*, 12 Cal.App.2d at p. 728.) However, as *Ukhtomski* observed, "[t]his difference is

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[9] Relying on Fessenden's testimony, plaintiffs argue that the cost of removing the improvements is minimal. However, this court may not "substitute its determination of a [witness's] credibility for that of the trial court." (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1076.) Here, the record, including the exhibits and defendants' testimony describing the nature of the improvements, fully support the trial court's finding that the cost of removing the improvements would be substantial.

merely one of fact" and did "not change the legal principle . . . that an injunction should not issue where its issuance would cause serious harm to the defendant and the injury caused by his inadvertence and mistake can be fully compensated by damages." (*Ukhtomski*, at p. 728.) Similarly, here, as previously discussed, the trial court properly balanced the equities involved in the present case.

Defendants argue that the trial court erred in granting plaintiffs any injunctive relief and in limiting the scope of their equitable easement to part of the southern portion of the disputed area, since it found that defendants satisfied the three factors of the relative hardship test.[10] There is no merit to this argument.

"The scope of an equitable easement should not be greater than is reasonably necessary to protect the defendant's interests." (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 268.)

Here, the trial court concluded that " [s]ignificant equities exist for both sides, but *the balance, as outlined above, favors defendants over a limited portion of the disputed area*. By granting an easement over just that portion, plaintiffs should not be prevented from proceeding with the plans to enhance their property." (Italics added.) Thus, the trial court identified the equities for each side, balanced the relative hardships, and concluded that the equities balanced in favor of defendants only as to a *limited* portion of the disputed area. As the trial court recognized, the limited scope of the equitable easement allows defendants to retain most of their improvements and the use of the rear enclosed portion of the disputed area. That the trial court reached a different conclusion than defendants would have reached does not mean that it misapplied the relative hardship doctrine.

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[10] Defendants also appear to be arguing that they are entitled to an equitable easement to the unfenced portion of the disputed area because the tree and boulders created a "natural boundary." However, there are no improvements in this portion of the disputed area. Defendants' desire for open space is clearly outweighed by plaintiffs' need to use this portion of their property for a driveway.

IV. Disposition

The judgment is affirmed. The parties shall bear their own costs.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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McAdams, J.